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## BEFORE THE ARIZONA CORPORATION COMMISSION

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JIM IRVIN  
Commissioner

FEB 01 2002

MARC SPITZER  
Commissioner

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E-01345A-01-0822

IN THE MATTER OF ARIZONA PUBLIC  
SERVICE COMPANY'S REQUEST FOR A  
PARTIAL VARIANCE OF CERTAIN  
REQUIREMENTS OF A.A.C. R14-2-1606

**ARIZONA PUBLIC SERVICE COMPANY'S SUPPLEMENTAL BRIEF  
ON APPLICATION OF A.R.S. § 40-252 TO THIS PROCEEDING**

Arizona Public Service Company ("APS" or "Company") hereby seeks leave to supplement its Brief of December 19, 2001 in light of the Chief Administrative Law Judge's ("ALJ") announced intent to issue a Procedural Order finding that the Company's request for a variance to A.A.C. R14-2-1606 (B) ["Rule 1606 (B)"] should be treated as a request to amend Decision No. 61973 (October 6, 1999) pursuant to A.R.S. § 40-252 ("Section 40-252"). Whereas the previous Company filing had focused on the appropriateness of the waiver process under A.A.C. R14-2-1614 (C) ["Rule 1614 (C)"] versus rulemaking under the Arizona Administrative Procedure Act, and the extent of notice required under Rule 1614 (C), the ALJ's proposed ruling frankly took APS by surprise. Given what APS believes will be the unfortunate and unintended consequences of such an unnecessary and legally improper ruling, APS believes it appropriate for the ALJ to consider these additional comments prior to issuing her suggested procedural order.

1       **I.       SUCH A FINDING IS UNNECESSARY AT THIS TIME**

2           The ALJ indicated that she was invoking Section 40-252, at least in part, to  
3 ensure that the requirements therein to notice and hearing were followed as regards the  
4 APS request for a variance. The Commission has already indicated its intent to hold an  
5 evidentiary hearing on the Company's request, and the Commission has the discretion  
6 to order whatever reasonable notice it believes appropriate. Such procedures are  
7 identical to those mandated by Section 40-252.

8           To date, no evidence has been heard, and the Commission has not proposed  
9 taking any substantive action on the Company's request for a variance. Thus, it is  
10 simply unnecessary for the ALJ to speculate now as to whether the Commission can or  
11 will substantively amend Decision No. 61973 in a manner that somehow implicates  
12 Section 40-252.

13       **II.       SUCH A FINDING IS IMPROPER AND CONTRARY TO PRIOR**  
14       **COMMISSION PRECEDENT**

15           In its Response of November 26, 2001 to an earlier Commission Staff pleading,  
16 APS explained how its filing was not a violation of the 1999 APS Settlement nor a  
17 change in Decision No. 61973. APS incorporates Section IV of such Response by  
18 reference herein and has attached it as an Exhibit to this pleading for the convenience  
19 of the ALJ and the parties. Moreover, the term "Electric Competition Rules" as  
20 defined in the INTRODUCTION to the Settlement and incorporated into Decision No.  
21 61973, specifically includes any variances granted thereto. In fact, the Commission  
22 specifically rejected the restrictive language contained in the original Section 7.1 of the  
23 APS Settlement Agreement precisely because it would have made it literally  
24 impossible to grant future variances and/or make amendments to the Electric  
25 Competition Rules without coming back to the parties to that Settlement and seeking an  
26 amendment to the order approving it.

1 It has been over 15 weeks since the Company's request for a variance to Rule  
2 1606 (B) was filed. To date, not a single signatory to the APS Settlement has alleged  
3 that the APS filing required a change to either the settlement or Decision No. 61973.  
4 This is no doubt in recognition of the fact that the Commission, in Decision No. 61973,  
5 compelled these parties to agree to an amendment to Section 7.1 of the settlement  
6 allowing the Commission to consider variances and amendments to the Electric  
7 Competition Rules.

8  
9 **III. SUCH A FINDING WOULD HAVE UNFORTUNATE AND  
UNINTENDED CONSEQUENCES**

10 APS noted in its December 19th Brief that on at least two prior instances, the  
11 Commission had granted variances to APS concerning an Electric Competition Rule  
12 (A.A.C. R14-2-1615) specifically referenced and incorporated into the 1999 APS  
13 Settlement and Decision No. 61973. *See* Decision Nos. 63316 (January 11, 2001) and  
14 63364 (February 8, 2001). In none of these prior instances did the Commission comply  
15 with the procedural requirements of Section 40-252 nor did anyone (including the  
16 Commission) suggest that such compliance was necessary. Thus, at least implicitly,  
17 the Commission has already determined that it can grant variances to provisions of the  
18 Electric Competition Rules incorporated into Decision No. 61973 without the need to  
19 amend Decision No. 61973 itself. The ALJ's proposed invocation of Section 40-252 in  
20 this instance would cast a cloud over the validity of all these previous Commission  
21 decisions.

22 Casting the present proceeding as one arising under Section 40-252 may also  
23 severely limit or even render moot the Commission's ability to act in the public  
24 interest. As a party to the 1999 APS Settlement, which the Court of Appeals has  
25 likened to a contract, the Commission could put itself into a position wherein it would  
26

1 have to gain the approval of the other signatories to the Settlement in order to grant  
2 APS and its customers any relief. This would place the Commission in precisely the  
3 sort of regulatory quandary it sought to avoid by requiring the signatories to the  
4 Settlement to agree to a revised Section 7.1.

5 In a practical sense, the Commission's Chief ALJ's reference to Section 40-252  
6 could be portrayed and construed as the Commission attempting to in some way  
7 "reopen" the 1999 APS Settlement. This could produce a severely negative financial  
8 impact on the Company given the heightened scrutiny being given to the credit quality  
9 of public utilities. Several years ago, just a casual Open Meeting amendment by a  
10 former Commissioner to a largely unrelated order suggesting that the Company's 1996  
11 rate settlement would be re-examined caused a precipitous drop in the Company's  
12 stock price and a distinctly unfavorable reaction in the financial press. The impact was  
13 so severe that the Commission felt it necessary to call a Special Open Meeting the  
14 following day to attempt to alleviate those concerns. Wall Street favors stability and  
15 predictability, and an important factor in its evaluation of APS's financial outlook is  
16 continuation of the 1999 APS Rate Settlement, especially since that settlement has just  
17 recently survived all legal challenges to its enforceability.

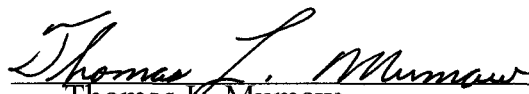
#### 18 19 **IV. CONCLUSION**

20 APS urges the ALJ to carefully reconsider her proposed ruling regarding the  
21 applicability of Section 40-252. The Electric Competition Rules clearly permit the  
22 Commission to consider variance requests. The 1999 APS Settlement and Decision  
23 No. 61973 envisioned the possibility of such variance requests or even the making of  
24 amendments to the Electric Competition Rules without disturbing the settlement itself.  
25 Invoking Section 40-252 serves no useful purpose from a procedural sense, is  
26 inconsistent with prior Commission decisions, and may well have significant and

1 adverse consequences to the Company and its customers, as well as to the  
2 Commission's ability to act in the public interest in this matter.

3  
4 RESPECTFULLY SUBMITTED this 1st day of February, 2002.

5 SNELL & WILMER L.L.P.

6   
7 Thomas L. Mumaw  
8 Jeffrey B. Guldner  
9 Faraz Sanei

10 Attorneys for Arizona Public  
11 Service Company  
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1 Original and 10 copies of the foregoing  
2 filed this 1st day of February, 2002,  
3 with:

4 Docket Control  
5 Arizona Corporation Commission  
6 1200 West Washington  
7 Phoenix, AZ 85007

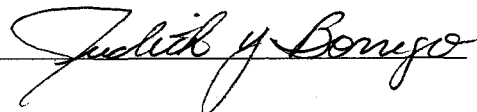
8 Copy of the foregoing mailed, faxed  
9 or hand-delivered  
10 this 1st day of February, 2002, to:

11 Lyn A. Farmer, Esq.  
12 Chief Administrative Law Judge  
13 Hearing Division  
14 Arizona Corporation Commission  
15 1200 West Washington Street  
16 Phoenix, AZ 85007

17 Christopher C. Kempsey, Esq.  
18 Legal Division  
19 Arizona Corporation Commission  
20 1200 West Washington  
21 Phoenix, AZ 85007

22 Ernest Johnson, Director  
23 Utilities Division  
24 Arizona Corporation Commission  
25 1200 West Washington Street  
26 Phoenix, AZ 85007

Parties of Record in  
Docket No. E-01365A-01-0822



IV.  
THE COMPANY'S REQUEST DOES NOT SEEK A CHANGE  
IN THE 1999 APS RATE SETTLEMENT AGREEMENT

A. Sections 4.1.3 and 7.8

It is Staff's Response, not the Company's October filing, that seeks to improperly change the 1999 settlement. Staff's Response contends that the Company somehow seeks to alter Section 4.1.3 of the 1999 APS rate settlement agreement, approved with modifications in Decision No. 61973, or that the October filing represents a difference in interpretation of that provision by the parties that requires the signatories of the settlement to "meet and confer" pursuant to Section 7.8 of the agreement. *See* Response at page 4, lines 21-22; page 6, lines 24 - 26; and page 7 lines 15 -18. However, neither Section 4.1.3 (which was not in the original settlement and was requested by a non-party to the settlement, Enron Energy Services during the Commission's deliberations on the agreement) nor Section 7.8 explicitly incorporate the competitive bidding requirement of Rule 1606 (B).<sup>1</sup> The former merely commits APS to follow the Electric Competition Rules as regards Standard Offer procurement, which rules expressly permit requests for variances. Indeed, the Commission has already granted several variances to Electric Competition Rules, at least one of which was also a subject area of the 1999 APS settlement - and without there even being a request on file. *See*, e.g., Decision No. 63354 (February 8, 2001) - APS and other Affected Utilities relieved of the obligation to divest a portion of their generation.

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<sup>1</sup> The latter provision (Section 7.8) of the APS settlement is only triggered when APS becomes aware of a disagreement with another party to the settlement (which would not include Staff) over its interpretation. APS was not and is not aware of any such disagreement and has received no request from a party to the settlement for a conference, but will fully comply with its obligation to meet and confer whenever requested to do so.

1 B. WestConnect

2 Although entirely unrelated to the October 18th request for variance, Staff also  
3 raises the issue of WestConnect as being somehow contrary to the 1999 APS settlement  
4 and the Electric Competition Rules.<sup>2</sup> See Response at page 4, lines 25 –28; page 6, line  
5 28 – page 7, line 2. This concern is as inexplicable as it is unmerited. With the  
6 Commission’s full knowledge, the Company has expended substantial resources in  
7 both time and money in its leadership role in forming first Desert Star and then its  
8 successor organization, WestConnect.

9 Rule 1609 (C) of the Electric Competition Rules clearly does not require that the  
10 RTO must be the then contemplated “Desert Star.” In fact, it does not even mention  
11 “Desert Star” as such. As to the reference to Desert Star in Section 7.6 of the APS  
12 settlement, it is merely intended as a generic reference to an RTO or ISO, since FERC  
13 would have the final say as to the structure of any such organization irrespective of the  
14 agreement or the wishes of the parties to that agreement, including the Commission. If  
15 any parties to the agreement now contend that Section 7.6 is tied to a specific name or a  
16 specific organization rather than to a concept (a “FERC-approved RTO or ISO” in the  
17 parlance of Rule 1609), APS will again offer to meet and confer with such parties.

18 Aside from its lack of relevance to the October filing or its relationship (or lack  
19 thereof) to the 1999 APS settlement and the Electric Competition Rules, APS was  
20 astounded by Staff’s apparent opposition to WestConnect. Although long aware of this  
21 alternative and public proposal to the moribund Desert Star (first proposed not by APS,  
22 but by El Paso Electric Company), Staff has never indicated so much as a word of  
23 opposition to the WestConnect concept, which draws heavily on the protocols  
24

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25 <sup>2</sup> APS does not know why Staff apparently believes this. Is it because WestConnect does not use the  
26 name “Desert Star” or because Staff does not consider West Connect to be a “Regional Transmission  
Organization” within the meaning of Rule 1609? The Response is silent.



1 developed for Desert Star. Even during face-to-face meetings with Staff during this  
2 past summer, APS received no negative comments on or objections to WestConnect.


3  
4 **V.**  
5 **STAFF'S RESPONSE UNFAIRLY CRITICIZES APS' FILING FOR**  
6 **NOT PRESENTING DETAILED EVIDENTIARY SUPPORT**  
7 **RESPECTING THE REQUESTED VARIANCE**

8 Staff's Response devotes an entire section to the proposition that "APS HAS  
9 NOT PROVIDED ANY SUPPORT FOR ITS REQUEST." See Response at pages 5  
10 and 6. The Company filed precisely what is required by A.A.C. R14-2-1614 (C).  
11 Although many of the assertions by APS in the October filing are, in its opinion, self-  
12 evident (e.g., the volatility of the wholesale market, the failure of the Electric  
13 Competition Rules to address supply reliability, and the significant rate increases and  
14 reliability problems experienced in California and else where during the past 18  
15 months), the Company will address relevant evidentiary issues raised by Staff in  
16 whatever forum (evidentiary hearings, Open Meeting, etc.) the Commission finds  
17 appropriate for the consideration of the APS request.

18 Curiously, Staff provides no support of its own for the statements in the  
19 Response that the "APS Request has far reaching implications in connection with the  
20 Commission's attempts to restructure the electric utility industry in Arizona" (*Id.* at  
21 page 1); that "circumstances have clearly changed since the Commission adopted the  
22 Electric Competition Rules" (*Id.* at page 2); that "competitive bidding is an integral part  
23 of the development of the restructured electric generation market" (*Id.* at page 3); that  
24 "the term of the PPA would ensure that no competitive electric generation market could  
25 develop in Arizona for the next 15 years" (*Id.* at page 4 – emphasis supplied); that the  
26



Grand Canyon State Electric  
Cooperative Association, Inc.

Your Touchstone Energy Cooperatives 

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February 1, 2002

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Via Hand Delivery

Docket Control  
Arizona Corporation Commission  
1200 West Washington  
Phoenix, Arizona 85007

Re: *Electric Competition Rules* Docket No. E-00000A-02-0051  
*AISA* Docket No. E-00000A-01-0630  
*APS Request for Variance* Docket No. E-01345A-01-0822

Dear Sir/Madam:

I am requesting to be placed on the mailing list of the following docket numbers:

Electric Competition Rules Docket No. E-00000A-02-0051  
AISA Docket No. E-00000A-01-0630  
APS Request for Variance Docket No. E-01345A-01-0822.

My name and address: John Wallace

Grand Canyon State Electric Cooperative Association, Inc.  
120 North 44<sup>th</sup> Street, Suite 100  
Phoenix, AZ 85034-1822

Arizona Corporation Commission  
**DOCKETED**

FEB 01 2002

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-------------	------------

Sincerely,

Grand Canyon State Electric  
Cooperative Association, Inc.

By:

  
John Wallace

ORIGINAL and 10 copies filed with  
Docket Control this 1st day of February, 2002.